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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 975

FYKE FARMER,
Petitioner,

vs.

J. M. ROUNTREE, Director of Internal Revenue, et al.,
Respondents.

FYKE FARMER,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

Petitioner Fyke Farmer asks that a writ of certiorari issue to review the judgments entered in these two cases on February 12, 1958, by the United States Court of Appeals for the Sixth Circuit. The two cases involve identical or closely related questions. As is permitted by Rule 23 (5) a single petition is presented covering both cases.

OPINIONS BELOW.

The memorandum opinion of the United States District Court for the Middle District of Tennessee sustaining motions for judgments on the pleadings in both cases, dismissing petitioner's action in the **Rountree** case and rendering a judgment in favor of the United States of America on its complaint against petitioner in the other case, has been reported at 149 F. Supp. 327.

The opinion of the Court of Appeals affirming the judgment of the district court was rendered February 12, 1958, and has been reported at 252 F. 2d 490. Petitioner filed a petition for a rehearing. On March 13, 1958, the Court of Appeals entered an order modifying its opinion on a point not presently material to this application for certiorari and denied a rehearing. The Court of Appeals has ordered the mandate stayed until May 5, 1958, pending application to the Court for certiorari, the stay to remain effective until disposition of the case in this Court provided the petition is filed within that time.

Copies of both opinions of the Court of Appeals are printed as Appendix A to this petition. The opinion of the District Court is printed in the Appendix filed in the Court of Appeals, nine copies of which are filed in this Court.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. A. 1254 (1).

QUESTIONS PRESENTED.

1. Does the Constitution authorize the taxing of United States citizens for the commission of crimes against peace, war crimes and crimes against humanity as defined by the Nuremberg Charter?

2. Is the Government invested by the Constitution with discretionary and uncontrollable foreign relations and taxing powers so wholly free from judicial inquiry and examination that the judicial power does not extend to the interpretation of the Constitution, the treaties and laws (including international law) and basing a judgment on well-pleaded allegations of facts showing the use of the principal part of the public revenue to cover the cost of such crimes, though the facts are admitted by the Government as a suitor invoking judicial aid for the collection of a tax from a citizen standing on his constitutional rights of conscience under the Federal and State Constitutions and claiming an immunity from being taxed for the support of such crimes.

3. Is the judgment rendered in the suit in favor of the Government refusing to pronounce judgment on the admitted facts and turning a fund belonging to the citizen on deposit in the registry of the court over to the Government contrary to public policy void for lack of due process of law guaranteed by the Fifth Amendment?

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED.

The constitutional provisions which are relevant to decision of this case are those contained in Articles I and II conferring powers with respect to war and foreign relations; the power conferred upon the Congress by Article I, Section 8 to lay and collect taxes for the "common defence"; the treaty power conferred by Article II, Section 2; the provisions of Article III extending the judicial power to all cases arising under the Constitution, the laws and treaties of the United States and to controversies to which the United States shall be a party; the Bill of Rights guaranteeing individual liberty and due process of law, especially Amendments I, V, IX and X; and the clause in

the Declaration of Rights of the Tennessee State Constitution reserving the right of conscience from control by any "human authority."

The treaties involved are the Treaty for the Renunciation of War; the United Nations Declaration and the Atlantic Charter; the Charter of the United Nations; the executive agreements providing for the creation of international military tribunals for the trial of war criminals following World War II and the charters of those tribunals; and certain international agreements and assurances of the United States and other United Nations governments during and after World War II pledging the fulfillment of the United Nations war aims through the elimination of military force in international relations and the building of world order under law, dedicated to peace, security, freedom and general well-being of mankind.

The statutes involved are the United Nations Participation Act of 1945, as amended; Tit. 22, U. S. C. A., declaring the United States policy as to settlement of international disputes and disarmament; and the provisions with respect to foreign wars and neutrality carried into Chapter 9 of Tit. 22, U. S. C. A.

Since these provisions are lengthy, their pertinent text is set forth in the appendix.

STATEMENT.

The question in both of these cases concerns the liability of petitioner for an assessment of a Federal Income Tax of $4,733.95 against him on his 1949 income. He refused payment on the ground that two-thirds of the money would be paid out of the Treasury for the cost of war and war activities amounting to crimes under international law.

1. The Injunction case (Farmer v. Rountree).

When the assessment was made in July, 1950, the armed forces of the United States were engaged in the war in Korea. Petitioner, believing this war on the part of the United States Government to be one of aggression and, therefore, a crime against peace under international law, claimed the right under the Constitution and international law to avoid any complicity in the crime through the payment of taxes required to support it. He, accordingly on this ground and relying on his constitutional right of conscience protested the demand for payment of the assessment to both the Commissioner of Internal Revenue and to President Harry S. Truman.

After the 1952 election of President Eisenhower petitioner tendered to him one-third of the amount of the assessment upon the condition that this payment be not deposited in the General Fund of the Treasury, but segregated in a special account or fund subject only to appropriations for the lawful and constitutional civil functions of government and so that no part thereof could be spent for the planning, preparing, initiating or waging of war.

Finally, in April, 1953, this tender was refused. A deputy collector of internal revenue delivered back to petitioner the certified check for $1,803.61 representing his tender and attempted to collect the tax by levying a warrant of distraint on a deposit belonging to petitioner in the First National Bank of Springfield, Springfield, Tennessee.

Thereupon, petitioner instituted an action in the United States District Court for the Middle District of Tennessee, Nashville Division, to obtain a judicial determination of the question of his liability for the tax and to enjoin the Director of Internal Revenue and his deputy from completing the distraint and the bank from paying over the fund under the demand for payment made upon it by the deputy collector. He renewed his tender in his complaint.

The bank interpleaded and pursuant to leave of court paid the entire deposit of $6,750.00 into the registry of the court. No application for an injunction was made and no injunction was issued.

Motions to dismiss petitioner's complaint having been denied, the defendants filed an answer. With respect to most of the material averments of the complaint, the defendants (whose answer was prepared by the Attorney General) said that for want of sufficient information they were unable either to admit or deny the allegations. Their answer, however, did admit the paragraph of the complaint averring that:

> "According to official reports and estimates, only one-third of the federal revenue was being used for the lawful, civil function(s) of the government at the time of the assessment and the placing of the lien against plaintiff's property."

After answer filed, the case was set for trial on September 25 and 26, 1956.

2. The Suit of the Government to Collect the Tax.

The complaint in United States of America v. Fyke Farmer and First National Bank, Springfield, Tennessee, was filed in the United States District Court for the Middle District of Tennessee May 31, 1956. It alleged that the United States of America was "a corporation sovereign and body politic." It set up the assessment against petitioner of the income tax for the year 1949. It alleged that the sum of $6,750 was on deposit in the registry of the court to cover the amount of the tax, said sum having been deposited in pursuance to an order of court entered in the action above mentioned. It alleged that no part of the tax had been paid. The complaint asked for a judgment against petitioner for the full amount of the assessment

and the foreclosure of the lien of the United States upon the deposited fund.

The answer of the bank disclaimed any interest in the deposit.

Petitioner's answer admitted the assessment and that no part of it had been paid. It denied that the plaintiff, United States of America, was entitled to a judgment against him for the reason that he was not constitutionally obligated for the payment of the tax. It set up as a defense the pendency of the case of **Farmer v. Rountree**, the denials of the motions to dismiss his complaint, the answer filed by the defendants, and that the case had been set for trial September 25, 1956. It set up the tender made by petitioner prior to the attempted distraint which was renewed when he brought the action to enjoin the collection of the tax, and an amendment to his complaint tendering the full amount of the assessment with interest to be paid out of the fund deposited in the registry of the court provided that it be deposited in a segregated or special account in the Treasury on the conditions above mentioned.

In his answer petitioner averred:

> "At the time the assessment was made, and ever since that time, by far the larger part of the federal revenue was and has been and is still being used by the legislative and executive branches of the government (acting outside the scope of any powers conferred upon them by the Constitution) for the commission of crimes against peace, war crimes and crimes against humanity in violation of international law, which is part of the law of the land of the United States and to which the United States is subject.
>
> "This defendant, in obedience to the dictates of his conscience, has felt and does now feel that it would be wrong for him to take a supporting (or even a con-

senting) part in any degree in the activities of the government mentioned. He feels that the payment of taxes (or submission to coercion applied for the enforced payment or collection of the revenue) would render him personally guilty of complicity in the aforesaid crimes. Because of his conscientious scruples against participation as a taxpayer in the commission of crimes against peace, war crimes and crimes against humanity, defendant has refused payment of any assessment against him on account of the 1949 income.

"Defendant is desirous of contributing his due and lawful share of the revenue necessary to support and maintain the lawful, civil and constitutional functions of the government under the Constitution. He has endeavored to do this but has been unable to get the government to accept payment under conditions that would protect him from the guilt of complicity in its criminal acts and activities mentioned that he feels would arise if taxes paid are deposited in the General Fund of the Treasury from which money is withdrawn to finance such criminal acts and activities."

Printed Answer (Exhibit to Appendix in Court of Appeals), Sec. VI, pp. 4-5.

In Sec. XIX of his printed answer at pages 110 to 114, petitioner set forth facts showing the consistency with which he has maintained his personal stand in opposition to war and war planning. He averred:

Defendant shows to the Court that his international rights to refuse to be made an accomplice in the crime of planning and preparing war in violation of the Nuremberg Law will only be respected and upheld through exercise of the judicial power. He has appealed in vain to the legislative and executive branches of the government.

Then follows a history of certain of petitioner's acts, efforts and appeals, after which he averred:

> In many other ways, limited by defendant's ability and means, he has opposed the fatuous attempt of the government to impose the rule of force on the world and sought to bring about the rule of law to abolish war. He believes that war can be abolished. He feels that his case testing whether the Nuremberg Law will be allowed to fade into oblivion until after another holocaust is of supreme national and international importance. He stands on his rights of conscience guaranteed by the First, Fifth, Ninth and Tenth Amendments to the Federal Constitution and upon the clause in the Declaration of Rights of the Tennessee Constitution providing that
>
> > ". . . no human authority can, in any case whatever, control or interfere with the rights of conscience."
>
> He says that his conscience tells him that the war planning, preparing, initiating and waging described in his answer are for aggression and violative of the Nuremberg Law; that he is compelled by reason of the dictates of his conscience to take the moral choice of refusing to render any support whatsoever in such war activities of the government. He feels that the right which he is claiming is a basic human right which it is the duty of the United Nations to recognize and uphold even against the government of the United States. He says that the jurisdiction of this Court in this case is limited to ascertaining whether the defendant has refused payment of the assessment, the enforcement of which is sought in this proceeding on a bona fide claim of an international right and on such finding to deny the government of the United States the relief sought for the collection of the tax.
>
> Printed Answer, page 114.

3. **Basis for Federal Jurisdiction in the District Court.**

In the injunction case, jurisdiction of the district court was invoked under Title 28, U. S. C. A., Sec. 1331, and under Art. III, Sec. 2 of the Constitution, the case being one under the Constitution, the laws and treaties of the United States. Petitioner alleged grounds for equitable intervention and the inapplicability of Sec. 3653 of the Internal Revenue Code prohibiting courts from restraining the collection of internal revenue taxes by showing that he would be without remedy to recover the tax after payment into the Treasury, because of

a) The inability of the United States to refund the entire amount of taxes illegally collected to cover the costs of the international crimes the Government was committing; and

b) The fact that the accounts of the Government were not so kept that petitioner could prove with sufficient definiteness and certainty the amount he would be entitled to recover.

The basis for jurisdiction in the Government's suit is Title 28, U. S. C. A., Sec. 1345, and Article III, Sec. 2 of the Constitution, it being a controversy to which the United States is the party petitioner or plaintiff.

The fact that actual fighting, i. e., the waging of war, in Korea had ceased at the time the Government brought its suit was not considered by the courts below as making any difference in the issues in the two cases. No such insistence has been made by the Government, presumably because of the rule that the jurisdiction of a court is to be determined by the state of facts existing at the time a suit is brought. **Mollan v. Torrance, 9 Wheat. 154; Minneapolis & St. L. R. Co. v. Peoria & P. U. R. Co., 270 U. S. 580.**

4. The Rulings in the District Court.

Two motions to dismiss were filed in the injunction case. Both raised the question that the district court was without jurisdiction because the complaint did not state a case or controversy within the jurisdiction of the court under Article III, Sec. 2 of the Constitution (App. pp. 53a and 96a). Judge Elmer D. Davies, one of the judges of the district court overruled both motions (App. pp. 95a and 101a).

Instead of a trial of the injunction case on September 25, 1956, a pre-trial conference was held. Another judge of the district court, the Honorable William E. Miller, sat in the hearings. Upon the court's suggestion, at the second day of the pre-trial conference, the Government presented motions for judgments on the pleadings in both cases. Orders were entered granting leave to file the motions, requiring petitioner to bring forward any additional matter by amendment to his pleadings and excluding all matters outside the pleadings. These orders further denied petitioner's motions for opportunity to resist the motions for judgments on the pleadings by depositions, interrogatories and requests for admission that had been filed by petitioner in the two cases and otherwise as contemplated by Rule 56 (c) of the Federal Rules of Civil Procedure. The court correctly stated that for the purpose of the disposition of the motions for judgments on the pleadings, the court was required to assume that all of the allegations of petitioner, including the allegation that the Korean War was a war of aggression, were true.

Subsequently, the motions for judgments on the pleadings were granted in both cases. The court filed a memorandum setting forth the grounds and reasons for the decision, which as above stated has been reported at 149 F. Supp. 327 and appears in the Appendix filed in the Court of Appeals at pages 125a-131a.

The decision was based, not on the ground that the factual averments in petitioner's pleadings were insufficient to state a case upon which any relief could be granted but, chiefly upon the ground that his claims could not be legally supported" and that the court lacked jurisdiction "to adjudicate facts essential to the taxpayer's case." It was not necessary, however, to resolve or find the facts from conflicting evidence for the facts were admitted by the motions for judgments on the pleadings.

Petitioner contended that the question of jurisdiction had been settled by the previous denial of the motions to dismiss in the injunction case. The second judge, however, in his memorandum held that the orders overruling the motions to dismiss "in effect reserved a ruling upon that question." This finding is utterly unsupported by anything appearing from the face of the orders or otherwise shown by the record.

5. The Affirmance of the Judgment by the Court of Appeals.

The Court of Appeals in a short per curiam opinion concurring in the opinion of the district court said:

> "The claims . . . involved political and governmental questions which are confided by the Constitution to the legislative and executive branches of the government, and over which the courts have no jurisdiction."

Petitioner filed a petition to rehear bringing again squarely to the attention of the court the questions which he was raising in these words:

> "The ground of appellant's refusal to pay the 1949 income tax assessed against him set up in his complaint in Case No. 13,198 was that the money if paid into the Treasury would be spent in principal part for the waging of the Korean War, alleged to be a war

of aggression and a war in violation of international treaties, agreements and assurances and hence, an international crime. Such authority as may be vested in the Congress to levy taxes, to appropriate public revenue for the common defense and general welfare of the country and the powers of the executive and legislative branches with respect to foreign policy are subject to the prohibition from treaties constituting the law of the land and from international law against war for aggression **or** in violation of treaties, etc.

"The question raised by appellant was whether the executive and legislative departments had exceeded their powers. As appellant's individual rights of personality and property were directly involved in the attempt to coerce payment of the tax, the issues were judicial and not purely 'political.'"

This part of the petition to rehear was denied without further opinion.

REASONS FOR GRANTING THE WRIT.

I. **The Court of Appeals has Decided Important Questions of Federal Law in Conflict With Applicable Decisions of this Court and Has so far Sanctioned Such a Departure by the District Court From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.**

a. **The denial of due process of law.**

There is absent from this litigation any question of immunity of the sovereign from being sued. When the Government brought suit against petitioner to collect the tax it submitted the issues which petitioner had raised in the injunction case for judicial decision. There is no rule that jurisdiction can be split so that the court could render judgment **for** but not **against** the Government. In **Lucken-**

bach S. S. Co. v. Norwegian Barque Thelka, 266 U. S. 328, Mr. Justice Holmes, delivering the opinion of the Court declared:

> "When the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter."

Accord: **United States v. Nourse, 6 Pet. 470; United States v. Dela Maza Arrendo, 6 Pet. 691; United States v. The Nuestra Senora de Regla (The Nuestra Senora de Regla), 108 U. S. 92; Clinkenbeard v. United States, 21 Wall. 65; United States v. Myers, Fed. Case No. 15,846, 3 Hughes 239, 27 Fed. Cases 43; U. S. v. Nebraska Distilling Co., 80 Fed. 285; Freeman v. United States, 157 Fed. 195; U. S. v. Bank of America, 15 Fed. 730.**

Judge Augustus N. Hand in **Bank Line Ltd. v. United States, 163 F. 2d 133 (2d C. C. A.),** declared:

> "It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual. Any other practice would strike at the personal responsibility of governmental agencies which is at the base of our institiutions."

A district court has declared that where the United States is a party litigant, it occupies no different or better position than the "humblest citizen." **Krug v. United States, 18 F. Supp. 242.**

If petitioner had failed to set forth in his pleadings facts showing what the crimes are that the tax money paid into the Treasury supports, there might be justification for the summary dismissal of his claims. But during the five years that the claims asserted by petitioner have been in litigation, no particular insufficiency of his factual allegations has been pointed out by **anyone.** The Government

did not see fit to test petitioner's answer to its complaint for insufficiency of the defense by motion to strike as authorized by Federal Rule of Civil Procedure 12 (f). At the pretrial conference, after petitioner had filed a Request for Admission under Rule 36 which had not been answered (Appendix 161a) and interrogatories (Appendix 147a), which had not been answered and petitioner had moved for an order of court requiring the Government to answer the interrogatories (Appendix 167a), there was still no question as to the truth of the facts pleaded by petitioner. The following colloquy occurred:

> The Court: Let's look at it this way: Let's suppose that the Court agrees with you in everything that you say you can prove. Everything! And then still is of the opinion that you have no cause of action, then do you think that I should afford you the right to take depositions?
>
> Mr. Farmer: Yes, sir, I think so.
>
> The Court: On what basis?
>
> Mr. Farmer: Because this case may be appealed, and on appeal these issues are tendered and I think that your Honor would have to say that on the theory of the case which I present—that is, that international law does apply, that this international law does constitute a basis for my assertion of individual rights.
>
> The Court: Well, that's a question of law, isn't it?
>
> Mr. Farmer: But I have a right to prove the facts, to show the facts and circumstances and conditions on which I insist this law applies to me.
>
> The Court: You mean you think facts would make the international law applicable when it is not applicable on its face——
>
> Mr. Farmer: I think it is a question of application, of the operation of the acts and policies and measures of the government, and how they affect me individually, and that evidence is therefore proper and that I have a right to introduce evidence to support that.

The Court: You would have that right, but suppose the Court says that everything that you are going to prove is accepted as true, the statements that you make that you are going to prove, suppose the Court should agree with that. **I am assuming that you can prove it** and still you have no cause of action. Then, do you think I ought to put down an order to let you take this proof, when I know it is immaterial and won't help your cause of action. There is no arbitrary right to take proof if a person has no claim in it.

Mr. Farmer: As I understand it, the government does not agree that these are the facts.

The Court: I am not going to approach this thing on any such basis, **I'm going to say that your version is true.**

Mr. Farmer: Yes, sir.

The Court: If there is a difference of opinion about the facts, and that conflict is one which is material to the legal rights of the parties, then, of course, I couldn't. . . . (Emphasis added.)

Counsel for the Government following this colloquy presented the motions for judgments on the pleadings after the following colloquy occurred:

Mr. Rita: We will make those motions in both cases immediately, your Honor.

The Court: All right, then, I will allow you to file motions for summary judgment.

. . .

The Court: . . . **Now, as I understand your motion, you are not having any affidavits or anything of that kind? You are saying that there is no issue of fact presented; that it is just a question of law.**

Mr. Rita: **Yes, sir.**

The Court: **That's the way I understood it from your opening statement.** . . . (Emphasis added.)

Notwithstanding the statements by the court, to which no objection was made by Government counsel, that the court would assume that petitioner could prove his allegations, in the memorandum sustaining the motions for judgments on the pleadings, the court said:

> But giving the taxpayers the benefit of all factual allegations of their pleadings, whether admitted or denied by the Government, it is apparent that their claims cannot be legally supported and that no amount of proof could give them validity.
>
> Appendix, page 127a.

The ruling above quoted indicates a very serious misconception of the legal consequence attaching to the motions for judgments on the pleading. Until the rendition of this decision it has always been held, so far as petitioner is aware, that the movant making a motion for judgment on the pleadings admits the truth of all material allegations of fact in his adversary's pleadings notwithstanding any denials of those facts in his own pleadings. In the case at bar no reply had been filed to petitioner's answer in the Government's suit and though the effect of the answer of the defendants in the injunction case neither admitting or denying the allegations of petitioner's complaint as amended was that of a denial (Federal Rules of Civil Procedure No. 8), no facts had been set up by the Government in any way contradicting those alleged by petitioner.

The rule of law governing the decision on the motions for judgments on the pleadings in these cases has been laid down by this Court in a number of cases. In **Ickes v. Fox, 300 U. S. 82,** Mr. Justice Sutherland, speaking for the Court, declared:

> "The motion to dismiss concedes the truth of these allegations; but even if they were denied we should still be obliged to indulge the presumption, in favor of the jurisdiction of the trial court, that respondents

might be able to prove them. United States v. Lee, 106 U. S. 196, 218, 219, 27 L. ed. 171, 181, 1 S. Ct. 240; cf. Tindal v. Wesley, 167 U. S. 204, 213 et seq., 42 L. ed. 137, 142, 17 S. Ct. 770."

Holding in **Chastleton Corp. v. Sinclair, 264 U. S. 543,** that a Federal statute depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed, the Court remanded a suit attacking the District Rent Acts to the District Court in order that "the facts may be accurately ascertained and are carefully weighed." Mr. Justice Holmes, delivering the opinion of the Court, said:

> "*Without going beyond* the limits of judicial knowledge, we can say at least that the plaintiff's allegations cannot be declared offhand to be unmaintainable, and that it is not impossible that a full development of the facts will show them to be true."

In **Hale v. Henkel, 201 U. S. 41,** the Court ruled:

> "The difficulty of maintaining a case upon the available evidence is a danger which the law does not recognize. In prosecuting a case, or in setting up a defense, the law takes no account of the practical difficulty which either party may have in procuring testimony. It judges of the law by the facts which each party claims, and not by what he may ultimately establish."

The United States Court of Appeals for the Eighth Circuit in **Louisiana Farmers' Protective Union v. Great A. & P. Co., 131 F. 2d 419,** has stated the controlling principles in these words:

> "The district judge was unable to believe the allegations of the complaint, that all of the strawberry growers in Louisiana who shipped strawberries in

interstate commerce were members of the appellant union, or that all of them assigned their claims to appellant. . . .

"It may be that the conclusions drawn by the district judge will prove correct when the evidence is in, but they are of a character usually drawn from the evidence after a hearing and not from the bare allegations of the pleadings. . . .

. . . . . .

". . . no matter how improbable it may be that the plaintiff can establish the allegations of its complaint it is, nevertheless, entitled to the opportunity to make the attempt. The opinion of the district judge, in advance of a hearing, as to the impossibility of proof of a cause of action fairly stated, is not decisive of the rights of the parties. And see Sparks v. England, 8 Cir., 113 F. 2d 579, 581."

Not only did the district court rule that petitioner's facts were not legally true. The opinion assumed facts which were not established in any way. Postulating that the executive and legislative departments had made "considered judgment" that the foreign and military policies were for "the legitimate purpose of national security or for the preservation of essential interests of the United States," the court held such putative decisions or judgments to be within the exclusive province of the political departments and not judicially examinable. From what source this information was obtained was not disclosed. As the fifth paragraph of the opinion shows, petitioner alleged facts negativing the court's assumption. The court was on notice that petitioner would offer proof to sustain his allegations. Considerations of fairness required that the court, if it had changed its mind after the assurance at the hearing that petitioner's version of the facts would be accepted as true, inform petitioner and give him

an opportunity to offer evidence on the issue. The practice of basing judgments on matter judicially noticed that is disputable was disapproved in **Ohio Bell Tel. Co. v. Public Utilities, 301 U. S. 292.**

In Volume I of American Law Institute's "Basic Problems of Evidence" (March, 1954) at page 14 it is stated:

> "**Procedure.** If the judge intends to take judicial notice of any matter, he should inform counsel of the proposition to be noticed and give them an opportunity to procure and present all relevant information as to the propriety of noticing the matter and as to the contents of the proposition. Rule 804 of the E. L. I. Code so provides. This is probably the usual practice, and considerations of fairness require it."

The question here is not whether "considered" judgment was made, but of **authority.** Let us take the matter of the Korean War. Congress has the constitutional power to declare war but it made no judgment that the war was necessary for the defense of the United States. By the United Nations Participation Act of 1945 as amended by the act of Oct. 10, 1949, the President was restricted as to the use of the armed forces. (See Appendix B herein.) No agreement had been negotiated with the Security Council of the United Nations making available any armed forces, facilities or assistance. The President's authority was limited to furnishing a detail of not more than 1,000 men for non-combatant service in the peaceful settlement of disputes. In ordering General MacArthur to engage the armed forces of the United States in the civil war in Korea under the "aegis" of the United Nations, President Truman plainly exceeded his authority.

Congress did not subsequently ratify the President's actions. It passed no act or joint or concurring resolution for this purpose. It made no appropriation specifically for

carrying on the war by the United States armed forces and those of the other United Nations members engaged in the "operation."

Petitioner's request for admission and interrogatories filed in the Government's suit (Appendix pp. 147a-166a) would have established that the war was financed by misapplication of the public money constituting the offense of embezzlement. The war costs ran into unascertained billions of dollars. Yet, the authority of the President to supply military equipment and services to foreign governments was strictly limited and conditioned by Sec. 421 of Title 22, U. S. C. A. (Appendix herein page 68). There is no pretense that the procedures required by this law were followed when Secretary of Defense Louis Johnson issued the memorandum directing the military departments to furnish logistic support and supplies to foreign governments to support "General MacArthur's operations in Korea" (Appendix 165a).

The truth of the matter—as shown by the record in these cases—is that when petitioner filed his suit the Treasury was being raided in complete defiance of the laws to carry on the illegal and criminal war. Only instead of carting off the money from the Treasury in trucks, they accomplished the siphoning off by "directives," presumably authorized by the Chief Executive who took an oath to faithfully perform the duty of taking "care that the Laws be faithfully executed."

If there was any fact not disclosed by the record that was deemed material to decision on the motion for judgments on the pleadings, any assumption that the court might make was required to be that which was less favorable to the Government. So this Court has held. **Clark v. Allen, 331 U. S. 530.** Cf. **Lanasa Fruit S. S. & I. Co. v. Universal Insurance Co., 302 U. S. 556.** The district court, by its arbitrary assumption which was made the basis for

a non-jurisdictional finding clearly violated that well-settled rule of law. The error was not merely procedural. It went to petitioner's substantive right to **law.** The right of a citizen to due process of law, this Court has said, "must rest upon a basis more substantial than favor or discretion." **Roller v. Holly, 176 U. S. 398.**

II. **This Case Presents Fundamental Constitutional Questions Which Have Not Been But Should Be Settled by This Court or Which Were Decided by the Court Below in a Way in Conflict With the Applicable Decisions of This Court.**

a. **The abdication of the judicial power—denial of the constitutional right of the individual to law guaranteed by the Fifth Amendment.**

Petitioner will not use this petition as a vehicle for the display of learning, or the lack of it, on the subject of "political questions." Mr. Justice Frankfurter, who knows as much, if not more, about the doctrine than anyone else, in his paper at the Harvard Conference on Government Under Law celebrating the two-hundredth anniversary of John Marshall's birth, said he would not undertake to find "the common denominator of these judicial abstentions."[1] Petitioner feels that he may appropriately suggest that the fact that the term "political questions" is nearly always written with quotation marks should put this Court on guard lest it be used as a mere slogan to evade judicial responsibility—the case presented by this record.

Certainly the broad statements in the memorandum of the district court that the executive and legislative branches have discretionary powers over foreign and military policies that are not examinable by the courts even

[1] Government Under Law edited by Arthur E. Sutherland, Harvard University Press, Cambridge: 1956, pages 18-19.

"after the event" will be shocking to all Americans for whom Marshall, in the hundred and fifty years since he became Chief Justice, "has come to symbolize . . . the doctrine that a written Constitution, interpreted by a Supreme Court, is the supreme law of the land, superseding all governmental action which purports to conflict with it."[2]

Terming the questions raised by petitioner concerning the conflict with the Constitution, the treaties and the laws from governmental action in the formulation and execution of foreign and military policies culminating in the Korean War "political", the courts below avoided decision on the merits. The holding that petitioner's claims could not be legally proven—as has been shown—was too utterly untenable to stand alone as the rule of decision in the case. Consequently, the courts had "to go the whole hog" by fortifying this holding with a doctrine, the effect of which establishes "foreign and military policy"—consisting of the planning, preparing, initiating and waging war and filching money out of the Treasury therefore by any means, "by hook or crook"—above the Constitution and the laws of the land.[3] This holding was vital to the decision made.

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[2] Ibid. Foreword by Erwin N. Griswold, Dean of Harvard Law School, page v.

[3] That such a doctrine is subversive of democratic or free government was argued by Charles A. Beard in *President Roosevelt and the Coming War*, Yale University Press, New Haven: 1948 in these paragraphs at pages 590-591:

> "Since the drafting of the Constitution, American statesmen of the first order have accepted the axiom that militarism and the exercise of arbitrary power over foreign affairs by the Executive are inveterate foes of republican institutions. It was in part to meet the threatened establishment of a military dictatorship on the ruins of representative government that George Washington took leadership in the formation and ratification of the Constitution. In No. 8 of the Federalist, Alexander Hamilton pointed out that any necessity which enhances the importance of the soldier 'proportionably degrades

The decision must stand or fall according to whether it is the law that the judicial power does not extend to the review of any exertions of power by the executive and legislative departments in the field of military and foreign policies.

Petitioner does not contend that the courts can place limitations on the authority of the executive and legislative departments, in the field of foreign relations or any other area of responsibility. He does contend that where limitations have been set up by the Constitution or by treaties constituting the law of the land and by international law under the authority of which both departments must exercise their powers, or by statutes by which Congress has prescribed rules applicable to and controlling the executive, and a case or controversy arises where the claim is made that official excesses have impinged upon individual rights protected by the Constitution, then it becomes the responsibility of the courts—at least "after the event"—to decide the claims according to the law and the facts as they are made to appear.

It has never been the law in this country that the executive and legislative departments are the exclusive and final judges of their own authority and the limitations thereon where individual rights are directly affected[4]

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the condition of the citizen. The military state becomes elevated above the civil.'

"But it is contended by some contemporary publicists, whose assurance is often more impressive than their knowledge of human government, that offense is the best defense, that unlimited striking power in the Executive is necessary to survival in an age of 'power politics' and 'atom bombs.' Few of them, it is true, venture to say openly that the Constitution is obsolete and that such centralization of authority should be, in fact, substituted for the system of limited government fortified by checks and balances. Yet the implication of their arguments is inexorable; constitutional and democratic government in the United States is at the end of its career."

[4] As the Chief Justice noted, *Trop v. Dulles* marked the 82d time that justices, sworn to discharge and perform all duties incumbent

In the case at bar, petitioner has shown in detail acts of the executive and legislative branches implementing military and foreign policy based on force and threats of war culminating in the plunging of the nation "into war with Korea without the consent of our citizens through their authorized representatives in Congress" (Republican Party 1952 Platform) and how these acts conflict with certain limitations upon the war and foreign relations powers of the two political departments. He has shown that these limitations arise from:

a) The constitutional grants of the powers to Congress exclusively to determine upon war and the levy of taxes and appropriation of money for the conduct of a war for the "common defense"[5] and which, therefore, necessarily imply a prohibition of the contrary, i. e., war for **aggression.** (Since the Tenth Amendment makes it clear beyond the possibility of doubt that powers not delegated to the United States or prohibited to the States are reserved to the people, another amendment to the Constitution would be required in order to confer the power of making war for aggression or taxing and paying out money from the Treas-

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on them "agreeably to the Constitution and laws of the United States," have determined that congressional action exceeded the bounds of the Constitution. Prof. Glendon A. Schubert, Jr., in a valuable study, *The Presidency in the Courts* (University of Minnesota Press, Minneapolis: 1957), has made a compilation of 38 cases holding presidential decisions unconstitutional. By express permission of the publisher and the author, the Appendix to that book listing these cases is reproduced and appended to this petition. *Duncan v. Kahanamoku*, 327 U. S. 304, overlooked by Prof. Schubert, brings the number to 39.

[5] It is submitted that "common" defense as used in the Constitution means the 48 states, the territories and possessions of the United States and does not by any stretch of the term include every 2 x 4 operator of a police state in half of Korea or Viet-Nam, or the island of Formosa who manages to subsist by tapping the American pipeline of arms and the billions appropriated for "mutual" military assistance to prevent "external and internal aggression" in the "general area of China," the Near East, the Far East and the Pacific.

ury therefor; cf. Mr. Justice Robert's opinion for the Court in **United States v. Butler, 297 U. S. 1,** 163, declaring that "powers not granted are prohibited");

b) The Treaty for the Renunciation of War forbidding the adoption of war as an instrument of foreign policy and the United Nations Charter containing an express covenant not to use in international relations either force or threats of force but instead for the settlement of international controversies only the peaceful and pacific procedures which the charter provides to ensure that another resort to the forceful methods adopted by the Axis Powers for the attainment of the aim of their foreign policy, viz., "the security and preservation of the nation and its propagation"[6] would not plunge the world into another and final cataclysm of destruction and death;

c) The assurance given by the United States as one of the leading nations signing the Atlantic Charter that it would not after the war employ land, sea or air armaments outside its frontiers to threaten aggression. (See Appendix herein, page 52);

d) The international common law developed through the London Agreement of August 5, 1945 (Appendix herein, page 54), the Nuremberg Judgment reported under the caption **United States of America v. Hermann Wilhelm Goering et al., 6 F. R. D. 69,** the other war crimes trials following World War II and the affirmation of the Nuremberg principles by the United Nations General Assembly forbidding as international crimes not only the initiating and waging of war for aggression or in violation of international treaties, agreements or assurances but also prescribing that everyone who takes part in any way in the

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[6] Hitler's 1937 statement outlining Germany's foreign policy quoted in *Nazi Conspiracy and Aggression* (U. S. Govt. Printing Office), Vol. I, page 377.

planning or preparation of these offenses is guilty of the gravest crimes against humanity; and

e) The Hague Convention of 1907 Respecting the Laws and Customs of War on Land and the international law developed as the result of the international agreements, assurances and acts set forth at pages 42-46 of petitioner's printed answer in the Government's suit which by their natural and inevitable effect make it a crime against peace, a war crime and a crime against humanity as defined by the Nuremberg Charter to plan and prepare war by atomic and nuclear weapons and biological and bacteriological warfare which can only result in extermination of civilian population.

The above were the questions which petitioner raised. They were not political in any sense of the word. They are **legal** questions. They require interpretation of the Constitution, the treaties and agreements mentioned. Would anyone say that under our system it is within the exclusive province of the Congress to make the decision called for by petitioner's assertion of his individual rights? Congress is not the House of Lords. No part of the judicial power is conferred upon the legislature by our system.

Is it possible that petitioner was mistaken in going to the courts for his remedy and that he should have tried to get a national referendum to decide what the law is by majority vote? Surely not.

Can it be maintained that decision of the questions is exclusively within the executive power? Let us see.

The executive function was exercised when the President recommended the treaties to the Senate for its advice and consent. It was exercised when the representative appointed by the President made the executive agreement creating the International Military Tribunal and defining its jurisdiction and prosecuted the charges against the ac-

cused before the Tribunal. It was exercised again when the President appointed another representative to sit as one of the judges of the Tribunal. These were acts within the exclusive province of the executive and treaty power under the Constitution. And the statutes passed by the Congress, the United Nations Participation Act of 1945 and the amendatory acts, were within the exclusive province of the legislative branch.

In such manner the law was made. Under the Constitution treaties are **law.** Treaties may operate directly as a source of rights and duties on the part of individuals. Unquestionably the treaties mentioned did not require legislation to make them effective for that purpose. The Nuremberg Charter and Judgment settled this point. In **Kennett et al. v. Chambers, 14 How. 38, 46,** construing certain treaties of amity and friendship between the United States of America and the United Mexican States, this Court declared:

> "These Treaties, while they remained in force, were, by the Constitution of the United States, the supreme law, and binding not only upon the government, but upon every citizen."

Certain propositions are so well and generally understood as to need no citation of authority:

The province of the courts is to decide on the rights of individuals.

The mere fact that a treaty is involved in a particular case does not necessarily mean that the court has no jurisdiction.

Congress has no constitutional power to settle rights under treaties except in cases purely political.

It is the duty of the courts only to judge. It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply it in par-

ticular cases, must of necessity expound and interpret that rule.

Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it becomes a case.

Cases arising under the Constitution are cases which require an interpretation of the Constitution for their correct decision. They arise when a litigant claims an actual or threatened invasion of his constitutional rights by the enforcement of some act of public authority and asks for judicial relief.

The question of jurisdiction of cases involving federal questions is determined by the allegations made by the plaintiff. There must be a right or immunity created by the Constitution, laws, or treaties of the United States which must be such that it will be supported if the Constitution, laws, or treaties are given one construction, or defeated if given another.

Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law and can will nothing. All that the court does, can do, is to announce its considered judgment on the question. The only power it has, if such it may be called, is the power of judgment. The court neither approves nor condemns any legislative or executive policy. Its office is to ascertain and declare whether the particular exertion of legislative or executive power complained of is in accordance with, or in contravention of, the Constitution, the treaties and the laws; and having done this, its duty ends.

It is the privilege of a litigant to raise the questions on which he deems his rights depend. The judgment must respond to the issues presented. No matter what the judge's personal preferences or predilections may be con-

cerning those issues, his duty is to decide what the law is and whether it applies to the facts on which the litigant has based his claims.

By every test, the questions raised by petitioner in this litigation were of judicial cognizance. The determination of these issues were of the very essence of the judicial function.

The judgments of the courts below are not responsive to the issues presented. It is no answer to questions (a) to (e), above set forth, merely to say, as the District Court and Court of Appeals did, that

> ". . . under the Constitution of the United States, Congress is vested with the exclusive right to levy taxes and to appropriate public revenue for the common defense and general welfare of the country, and to provide for, and maintain the Army and Navy; and that it has the exclusive authority to determine the requirements of national defense and the amount of tax revenue to be used for defense and military purposes."

There is **defense** and there is **aggression.** They are mutually exclusive. The distinction is as old as the United States of America. (See Oxford Universal Dictionary [Third Edition, 1955] tracing the origin of the term "war for aggression" to the year 1799.) A body of international law has been developed which is founded on that distinction. "War as an instrument of national policy" or "War for aggression" are juridical concepts provable in court like negligence, fraud, piracy, navigability, commerce and "restraint of trade" and many other concepts not precisely defined.

The principal question raised by petitioner was whether the Korean War on the part of the United States was a war of aggression or a war in violation of the treaties, international agreements and other assurances mentioned.

He alleged **facts** showing why it was a war of aggression and exactly how the treaties, agreements and assurances were violated. Neither the Government, nor the courts, have shown that any essential element or elements essential to establish that the war was of the character claimed was lacking. The courts could not, and did not, hold that the Constitution authorizes war for aggression or that the treaties, agreements and assurances mentioned did not have binding effect.

To declare merely that the Constitution confers upon Congress the exclusive right to levy taxes and to appropriate money for the common defense and general welfare of the country, to provide for and maintain an army and navy, and the exclusive authority to determine the requirements of national defense and the amount of revenue for defense and military purposes does not respond to **that** question.

Petitioner's questions concern not merely the **amount** of the revenue spent for military purposes. He questions the **legitimacy** and **constitutionality** of **purpose** of the war spending, the vast sums that have been withdrawn from the Treasury not in consequence of **appropriations** made by **law** contrary to the provisions of Art. I, Sec. 8, cl. 12, and Sec. 9, cl. 7, the use of the public revenue for the support of armies in foreign countries, the Korean Army and U. N. forces in Korea out of appropriations made for other purposes. (Printed answer in U. S. v. Farmer, p. 87; Interrogatories filed in that suit, Appendix 147a; and the facts of law violations admitted by the Government through its failure to answer or deny the Requests for Admission filed by petitioner, Appendix 163a.) He puts in question the spending of billions of dollars out of the Treasury for the waging of the Korean War by the United States, Korean and U. N. armies in plain violation of the express restrictions of Title 22, U. S. C. A., Sec. 287d-1 (Appendix herein, page 65).

Where and how have the courts below responded to these questions except to say that they come under the head of "foreign policy" which is the exclusive province of the executive and legislative branches?

Petitioner concedes that the executive and legislative departments do have certain discretionary powers in the field of foreign relations that are not judicially cognizable. There has met this year in Geneva a United Nations Conference on the Law of the Sea seeking to establish by treaty uniform territorial sea limits. The United States representative as a compromise effort to secure agreement dropped its insistence on a three-mile limit to join the traditional maritime powers in proposing a six-mile limit. No doubt this was within the discretion of the executive, but if a treaty should be made and on the recommendations of the President ratified by the Senate, would it be within the discretionary powers of the executive after it goes into effect to continue handling our foreign relations on the basis of a three-mile limit? Would not the new treaty limit the discretion of the President in his control of foreign relations?

In 1928 the French Government submitted to the United States Secretary of State Kellogg a form of treaty entitled "Draft of Pact of Perpetual Friendship between France and the United States." Through subsequent diplomatic negotiations Mr. Kellogg proposed instead of a bilateral treaty between France and the United States a multilateral treaty "binding the parties thereto not to resort to war with one another." Such a treaty was made and ratified by the United States Senate. There were 15 signatory powers and the definite adherence of 47 nonsignatory governments. (See Treaty for the Renunciation of War, Dept. of State Publication No. 468.)

It was within the discretion of the United States Secretary of State acting by the authority of the President to negotiate the Treaty for the Renunciation of War. After

it went into effect providing that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin that might arise between the parties would never be sought except by pacific means, was it discretionary with the executive and legislative branches to create the military posture described in Sec. XVIII of petitioner's printed answer pages 103 to 110 on the theory that threats of war will prevent war? Were the acts of the Government promoting the revival of unbridled militarism and a desperate arms race, dividing the United Nations into two armed camps, turning the organization (the U. N.) set up to **prevent** war into an organization to **make** war against the territorial integrity and independence of Korea, the rearming and remilitarization of Germany and Japan (described in Sec. XV, pages 60 to 68 of petitioner's printed answer) in violation of the United Nations agreements and assurances that these nations would not be allowed to rearm and the increasing threats to unleash atomic and nuclear bombs and weapons, by design or accident, on the Soviet Union means calculated for the observance and fulfillment the unequivocal and forever binding proscription of war as a means for the settlement of contained in the Treaty for the Renunciation of War and the United Nations Charter?

The settlement of boundaries, the recognition or nonrecognition of foreign governments, the appointment and reception of ministers, the promotion of commercial and cultural intercourse between the United States and other nations, the development of international law—these and many other matters and dealings—are properly—and indeed of necessity—within the discretionary authority of the executive department. In the matters mentioned nothing in the Constitution operates as a limitation on the executive power and the treaty power. The wisdom or propriety of what is done in such matters may not be made the subject of judicial inquiry or decision. It does not follow, however, that **every** act done by the executive

department, or acts of the executive and the legislative, is immune from judicial review. Forasmuch, under our system of constitutional government there is no room for arbitrary power and in the conduct of foreign relations, the political departments cannot exceed their constitutional grant of authority or act contrary to the principles of international law. **Wilson v. Girard, supra; United States v. Curtis Wright Export Corporation, 299 U. S. 304; MacLeod v. United States, 229 U. S. 416; Burnet v. Brooks, 288 U. S. 378; Schooner v. M'Faddon, 7 Cranch. 116.**

Charles Warren in his great work "The Supreme Court in United States History" pays tribute to the judiciary for the part it has played in preserving scrupulous respect for treaty obligations. Throughout the years there has remained with petitioner a vivid recollection that public indignation aroused by German militarism's disrespect of treaty obligations was one of the prime causes of America's entrance into World War I. The German Chancellor, von Bethmann Hollweg, could declare the treaty with Belgium to be "a mere scrap of paper." The American President, Wilson, inspired the nation with such sentiments and moral pronouncements as the following:

> "And so I say that it is patriotic sometimes to prefer the honor of the country to its material interest. Would you rather be deemed by all the nations of the world incapable of keeping your treaty obligations in order that you might have free tolls for American ships? The treaty under which we gave up that right may have been a mistaken treaty, but there was no mistake about its meaning.
>
> "When I have made a promise as a man I try to keep it, and I know of no other rule permissible to a nation. The most distinguished nation in the world is the nation that can and will keep its promises even to its own hurt. And I want to say parenthetically that I do not think anybody was hurt. . . .

> "The most patriotic man, ladies and gentlemen, is sometimes the man who goes in the direction that he thinks right even when he sees half the world against him. . . ."[7]

Have we as a nation forfeited our heritage? While the American Secretary of State will not **say** that our treaties renouncing war and force and threats of force in international relations are mere scraps of paper, he **treats** them that way.

It is not a function of the judicial power to compel the executive by mandamus or injunction to observe the laws. But what it can do is to protect the rights of individuals whenever an appropriate case is presented from the injury that will result from non-observance of the law. This rule was laid down in **State of Mississippi v. Johnson, 4 Wall. 475,** in these words:

> "The Congress is the legislative department of the Government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance."

This is such a case. Petitioner is defending against arbitrary power. His right to make the defense is grounded on the guarantees of personal liberty in both the Tennessee and the federal constitutions, as well as on the basic principle of the criminal law recognized in every jurisprudence that if a certain act is forbidden, everybody else must refrain from aiding the criminal.[8]

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[7] Address on "The Meaning of the Declaration of Independence" delivered at Independence Hall, July 4, 1914, printed in *Democracy Today*, The Lake English Classics, Scott, Foresman & Co., Chicago and New York: 1917, page 63.

[8] Cf. Clark and Marshall on the Law of Crimes (4th edition by Kearney) Callahan & Co., 1940, Sec. 67, page 100; also Title 18 U. S. C. 4, punishing the offense of misprision of felony.

In a public statement announcing his refusal to pay the tax, petitioner stated:

> "I am a law-abiding citizen. My government has no right or power to force me to become a war criminal. The Nuremberg Law says that those guilty of complicity in war activities within the prohibition of that law render themselves guilty of the crime along with the heads of states and high policy makers. In refusing to pay taxes to support the war activities of the Government of the United States, I am not in disobedience to the law. I am obeying the law."

Petitioner's right and duty to refuse to pay taxes for the criminal ends and purposes of the government is not merely that which all citizens have in common to have the government administered according to law, without waste of the public money as in **Fairchild v. Hughes, 258 U. S. 126.** Nor is it based on the unlawful diversion which will deplete the public funds and thus increase the burden of future taxation as in **Frothingham v. Mellon, 262 U. S. 447.** It is the right to resist the taking of his property for unconstitutional ends as in **United States v. Butler, 297 U. S. 1.** It is the right not to be degraded by the Government into compulsory cooperation with crime—a right certainly not inferior in the eyes of the law to the right against defamation by government. **Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123.** It is the right without which American citizenship will suffer a great fall.

The fact that Congress' power over appropriations is involved renders the questions raised no more "political" than the question whether the legislative discretion covered a violation of the prohibition against bills of attainder. **Lovett v. United States, 328 U. S. 303.** Is freedom of conscience inferior in the eyes of the law to freedom from attainder or from cruel and inhuman punishment?

CONCLUSION.

Seldom is a case brought before this Court as fateful for the destiny of the nation and the peace of the world as this. It would seem that the Constitution is broad enough and secure enough to allow one solitary individual to win emancipation from aggressive militarism and war slavery. Diplomacy has failed to end a desperate arms race that has continued for a dozen years, one whose tempo has increased year by year, month by month, week by week and day by day. Decision for petitioner in this case might be the key that will unlock the portals barring entrance to a world joyously embracing order and tranquility under law.

The answer given by this Court to this petition for redress of grievances doubtless will depend on the choice between two rival theories of government. Both profess devotion to the principles of the Constitution and the rule of law, but the one emphasizes human rights and the other exalts government powers. The coming struggle was perhaps foreseen by none so early and so clearly as by two eminent Americans, Dr. Harry Emerson Fosdick and Prof. Edward S. Corwin.

Dr. Fosdick, pastor of the Riverside Church in New York on Thanksgiving Day, November 21, 1943, preached a sermon on the subject "Worshipping the Gods of a Beaten Enemy." The theme of the sermon was that all history teaches one lesson about war, viz., its inevitable tendency to lead the victor to take on the character of the vanquished. The paradox which darkened history's ages he said was "that in fighting our enemies we copy them, and in our victories over them assume ourselves the very attributes and qualities we have fought against." As mute evidence of the soundness of the observation may be cited the fact that today there are many more who seem to be

willing to fight a war to death for the ideals that have made the American nation great than simply to live by them.

Prof. Corwin delivered at the University of Michigan in 1945, a series of lectures which were published in book form under the title "Total War and the Constitution" (Knopf, New York, 1947). The title putting the Constitution **behind** Total War bespeaks the baleful import of the author's arguments. The publisher's fly-leaf states:

> "In this book Edward S. Corwin demonstrates with force and authority that the powers delegated to or assumed by the President during the war have virtually ended whatever balance of powers (as set forth in the Constitution) still remained among the three major branches of our government. Professor Corwin sees this tendency toward centralization—and finding constitutional sanction for it—as one that began early in our national life and made its greatest strides when powers willingly ceded to the executive during each emergency could not be or were not withdrawn later."

No friend of judicial review, Prof. Corwin in the foreword which he wrote as editor of the 1952 Constitution of the United States of America, Revised and Annotated (Sen. Doc. 170, 82d Congress, 2d Session), expresses the view that "In the field of foreign relations . . . the doctrine of enumerated powers has always had a difficult row to hoe, and today may be unqualifiedly asserted to be defunct" (page xv). At page 180 of the book Total War and the Constitution the author boldly states that "the Websterian conception of a 'Constitution of Rights,' featured especially by an elaboration of checks and balances" is not "only on the way out—it **is** out." Nevertheless, the learned professor concedes that "unquestionably there were values underlying this conception which we should not

wish to see squeezed out of the Constitution altogether, one of them—the most important and most ancient one—being the idea of **liberty against government.**"

In this case for the first time there is judicial dependence on what petitioner feels may fittingly be termed the Corwinian conception of a Constitution of Prerogative Powers. In the oral argument before Judge McGarraghy in the Girard case, the Government took the position that the decision not to exercise the right to try Girard was "a determination by the executive branch in the conduct of foreign and military affairs and poses no question for judicial review."[9] In his ruling Judge McGarraghy took no note of the point and the Government's brief in this Court toned the argument down to the statement in the body of the section dealing with international law that "Where the Executive has thus taken a definite and formal position on a matter of international law, the courts should follow it if it is reasonably possible for them to do so." The Court's opinion in the Girard case cited one of Marshall's opinions to show that the treaty and agreements involved were consistent with international law.

The case which this petition presents stands on an entirely different footing. Being unable to find that the acts of the executive complained of by petitioner did not violate the treaties and international law, the courts below announced what is in effect the doctrine of prerogative powers in the conduct of foreign and military affairs. As applied in the case at bar it amounts to absolutism, i. e., that the doctrines of enumerated powers, checks and balances and the independent judiciary, as Prof. Corwin says, are "out" in the field of military and foreign affairs. Turning to another of Prof. Corwin's books where his ideas are forcefully expounded we find that he adopts Locke's definition of "prerogative" as "this power to act

[9] The New York Times, June 19, 1957, page 6, col. 3.

according to discretion for the public good, without prescription of the law and sometimes even against it." (The Presidency Today, by Corwin and Koenig, New York University Press, New York: 1956, page 14.) In Chap. II dealing with the subject "Of Presidential Prerogative" it is explained that the term means "power claimed by the President primarily on the basis of the Constitution itself."

It is interesting to note that in The Presidency Today, the authors criticize this Court's decision in the steel seizure case. It will be recalled that the President's justification for the seizure was "the requirements of national security." The learned authors say that the court's opinion in that case "bears all the earmarks of hasty improvisation as well as strong prepossession" (page 41). Elsewhere they say that the President "underwent a technical defeat" adding that "Even so, the full implication of the case is by no means unfavorable to presidential pretensions in time of stress" (page 93).

Significantly enough there is not one word in the "Presidency Today" about President Truman's usurpation of the power of Congress to declare war when he sent Gen. MacArthur into Korea.

Petitioner has dwelt on the ideas of Prof. Corwin to show that a refusal by the Court to grant certiorari in this case may have disastrous consequences. Prof. Corwin **may** be right. The rebuff which presidential pretensions received in the steel seizure case may after all be only a **technical** defeat. This case may be the last and best chance to save the government of the people, by the people and for the people from being subverted into a military dictatorship. There are signs on the horizon indicating its coming, already bigger than a man's hand. Secretary Dulles' threats that the President, without consulting Congress, can strike back "instantly" and "massively" against any "aggression" anywhere in 42 or more coun-

tries linked with the United States by military pacts in Europe, the Middle East, the Far East and the Americas resound around the world. And it has come to light that planes loaded with hydrogen bombs are taking off at the flash on the radar screen in distant parts of the world tuned for orders to drop their lethal load on Russian targets.

Nothing but a decision of this Court upholding individual immunity from participation in and support of such madness can prevent the treaties made by this nation and international law, built up hardly a generation ago at so great a sacrifice, from being trampled under foot.

From a heart weary and aching from twelve whole years of watching the arms race go on with mounting fury—a folly which nearly all those in positions of leadership, whether in office or outside of it, recognize and, indeed, admit but few will raise even a little finger to stop—petitioner pleads with the Court to let this case come on for hearing and argument. Remove not the ancient landmark of Liberty Against Government!

Not for himself only does petitioner make the plea, but for our children, and the children of our friends, and for all the young lives that are marching up from the gates of birth, pure and eager, with the morning sunshine on their faces. He pleads for help that these may be spared from the poisoning of the air they must breathe, the water they must drink, and the earth which must produce their food with our planning and preparing and testing more frightful and efficient ways to kill innocent people en masse.

Hear the prayer of Walter Rauschenbusch:

> "O Lord, since the first blood of Abel cried to thee from the ground that drank it, this earth of Thine has been defiled with the blood of man shed by his

brother's hand, and the centuries throb with the ceaseless horror of war. Ever the pride of kings and the covetousness of the strong have driven peaceful nations to slaughter. Ever the songs of the past and the pomp of armies have been used to inflame the passions of the people. Our spirit cries out to Thee in revolt against it, and we know that our righteous anger is answered by Thy holy wrath.

"Break Thou the spell of the enchantments that make the nations drunk with the lust of battle and draw them on as willing tools of death. Grant us a quiet and steadfast mind when our own nation clamors for vengeance or aggression. Strengthen our sense of justice and our regard for the equal worth of peoples and races. Grant to the rulers of nations faith in the possibility of peace through justice, and grant to the common people a new and stern enthusiasm for the cause of peace. . . .

"O Thou strong Father of all nations, draw all Thy great family together with an increasing sense of our common blood and destiny, that peace may come on earth at last, and Thy sun may shed its light rejoicing on a holy brotherhood of peoples."

Most humbly and prayerfully submitted,

FYKE FARMER Pro Se,
300 West Bellevue Drive,
Nashville 5, Tennessee.

APPENDIX A.

Nos. 13,198, 13,199.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

No. 13,198.

FYKE FARMER,
Appellant,

vs.

J. M. ROUNTREE, Director of Internal Revenue et al.,
Appellees.

No. 13,199.

FYKE FARMER,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Appeals from the Judgments of the United States District Court for the Middle District of Tennessee.

Decided February 12, 1958.

Before McAllister, Miller, and Stewart, Circuit Judges.

Per Curiam. These are appeals from judgments of the district court, dismissing appellant's complaints and granting appellees' motions for judgments on the pleadings. Appellant filed his complaints for judgments declaring his immunity in substantial part, from income tax liability for the year 1949; to recover assessed income taxes for that year; and for a refund of such taxes. He based his claim

on the ground that the military and foreign policies of the United States, since World War II, including the prosecution of the Korean War, were designed and carried out in violation of international law, and were, therefore illegal and void; and that he had the right to refuse payment of two-thirds of his income tax for the reason that the said revenue had been illegally appropriated by Congress for such illegal purposes, and that only one-third of such revenue had been appropriated for the legal and Constitutional functions of the government. The district court held that this claim involved the resolution of political questions, and that the courts had no right to resolve such questions; that, under the Constitution of the United States, Congress is vested with the exclusive right to levy taxes and to appropriate public revenue for the common defense and general welfare of the country, and to provide for, and maintain the Army and Navy; *and that it has the* exclusive authority to determine the requirements of national defense and the amount of tax revenue to be used for defense or military purposes. The court further held that the foreign policy of the United States is the exclusive province of the executive and legislative branches of the government; and that the court lacked jurisdiction to adjudicate the claims set forth by appellant. With respect to a contention that the prior order of a district judge, overruling the motions to dismiss, constituted the law in the case, the district court held that such order was, in effect, a reservation of a ruling upon the question of jurisdiction.

The copious briefs of appellant disclose an extensive knowledge of the foreign relations and policies of the United States government. The claims set forth in the complaint, however, involved political and governmental questions which are confided by the Constitution to the legislative and executive branches of the government, and over which the courts have no jurisdiction.

We agree with the government's contention, also, that the prior order overruling motions to dismiss, did not constitute the law of the case.

All of these contentions were fully considered and determined in the opinion of Judge William E. Miller, reported in 149 F. Supp. 327, with which we concur; and the judgment of the district court is, accordingly, affirmed for the reasons set forth in that opinion.

Nos. 13,198, 13,199.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

No. 13,198.

FYKE FARMER,
Appellant,

v.

J. M. ROUNTREE, Director of Internal Revenue et al.,
Appellees.

No. 13,199.

FYKE FARMER,
Appellant,

v.

THE UNITED STATES OF AMERICA,
Appellee.

Filed Mar 13 1958
Carl W. Reuss, Clerk.
Order Amending Opinion and Denying Rehearing.

Before: McAllister, Miller and Stewart, Circuit Judges

Per Curiam. It appears in the opinion filed in the District Court that the District Judge disposed of appellant's

petition for a declaratory judgment and injunction, as well as the petition of another for a refund of taxes. The disposition of the cases was made by the Court on motion for judgments on the pleadings in both cases, as the petitions were based upon the same grounds. In this Court, we had before us only the appeals of appellant Farmer and he sought a declaratory judgment and injunction, but not a refund.

It Is Accordingly Ordered that the first two sentences of the Opinion heretofore filed be amended to read as follows:

> "These are appeals from judgments of the District Court dismissing appellant's complaint and granting appellee's motion for judgment on the pleadings. Appellant filed his complaint for judgment declaring his immunity, in substantial part, from income tax liability for the year 1949, and to enjoin collection of the income taxes assessed against him for that year."

It Is Further Ordered that the petition for rehearing be denied.

Approved for entry:

.....

United States Circuit Judge.

APPENDIX B.

Constitutional Provisions, Treaties and Statutes Involved.

The Preamble of the Constitution of the United States of America is as follows:

> WE THE PEOPLE of the United States in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I provides in pertinent part:

> Section 8. The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; . . .
>
> To declare War, grant letters of Marque and Reprisal, and make Rules concerning Capture on Land and Water;
>
> To Raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than Two years;
>
> To provide and maintain a Navy;
>
> To Make Rules for the Government and Regulation of the land and naval Forces;
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.
>
> Section 9. No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all Public Money shall be published from time to time.

Article II provides in pertinent part:

> Section 1. The executive powers shall be vested in the President of the United States of America.
>
> Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, . . . He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur;
>
> Section 3. . . . he shall take care that the Laws be faithfully executed, . . .

Article III provides in pertinent part:

> Section 1. The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time establish . . .
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made under their authority; . . . to Controversies to which the United States shall be a party; . . .

Article VI provides in pertinent part:

> This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the authority of the United States, shall be the supreme Law of the Land; . . .

Amendment I provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

Amendment V provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property without due process of law; . . .

Amendment IX provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Declaration of Rights of the Constitution of the State of Tennessee provides in pertinent part:

> . . . no human authority can, in any case whatever, control or interfere with the rights of conscience.

Article XI, Section 16, of the Tennessee Constitution provides:

> The declaration of rights, hereto affixed, is declared to be part of the Constitution of this State, and shall never be violated on any pretense whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the Bill of Rights contained is excepted out of the general powers of the government, and shall forever remain inviolate.

International Treaties, Agreements and Assurances.

A. **Treaty for the renunciation of war** (46 Stat. 2343).

The treaty between the United States of America and sixty-one other powers (generally known as the Kellogg-Briand Pact) proclaimed by President Herbert Hoover, July 24, 1929, and published in 46 Stat. 2343 provides that

the President of the United States, and the other signatory heads of States

Deeply sensible of their solemn duty to promote the welfare of mankind;

Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that peaceful and friendly relations existing between their peoples may be perpetuated;

Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty;

Hopeful that, encouraged by their example, all the other nations of the world will join in this humane endeavor and by adhering to the present Treaty as soon as it comes into force bring their peoples within the scope of its beneficient provisions, thus uniting the civilized nations of the world in a common renunciation of war as an instrument of their national policy;

. . . have agreed upon the following articles:

Article I.

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy with one another.

Article II.

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

President Hoover's proclamation of said treaty stated:

> Now Therefore, be it known that I, Herbert Hoover, President of the United States of America, have caused the said treaty to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

B. **The United Nations' declaration and the Atlantic Charter** (55 Stat. 1600):

On January 1, 1952, the representatives of twenty-six nations that were fighting the war against the Axis Powers, Germany, Italy and Japan, signed in Washington, D. C., a Declaration of the United Nations. The text of the Declaration was, in part, as follows:

> The Governments signatory hereto,
>
> Having subscribed to a common program of purposes and principles embodied in the Joint Declaration of the President of the United States of America and the Prime Minister of the United Kingdom of Great Britain and Northern Ireland, dated August 14, 1941, known as the Atlantic Charter. . . .

The United Nations' Declaration and the Atlantic Charter were published in 55 Stat. 1600. The Atlantic Charter, among other things, stated:

> The President of the United States of America and the Prime Minister, Mr. Churchill, representing His Majesty's Government in the United Kingdom, being met together, deem it right to make known certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world.

First, their countries seek no aggrandizement, territorial or other;

Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned;

Third, they respect the right of all peoples to choose the form of government under which they will live; . . .

. . .

Sixth, after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all men in all lands may live out their lives in freedom from fear and want;

. . .

Eighth, they believe that all nations of the world, for realistic as well as spiritual reasons, must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside their frontiers, they believe, pending the establishment of a wider and permanent system of general security, that the disarmament of such nations is essential. They will likewise aid and encourage all other practicable measures which will lighten for peace-loving peoples the crushing burden of armaments.

Franklin D. Roosevelt,
Winston Churchill.

Dated August 14, 1941.

In addition to the original twenty-six signatories to the United Nations Declaration, twenty-one other nations during World War II adhered to the Declaration.

C. **Charter of the United Nations** (59 Stat. 1031).

On June 26, 1945, the Charter of the United Nations was signed at San Francisco and after ratification by the United States Senate was proclaimed by President Truman to be effective October 24, 1945. In pursuance to law, the Charter and the President's Proclamation were published in 59 Stat. 1031. That Proclamation states that it was proclaimed:

> . . . to the end that the same and every article and clause thereof may be observed and fulfilled with good faith on and from the twenty-fourth day of October, one thousand nine hundred forty-five, by the United States of America and all other persons subject to the jurisdiction thereof.

By Article 2, Section 4, of the United Nations Charter it is provided:

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.

One of the Purposes stated in the Charter of the United Nations is in Article I as follows:

> 1. To . . . bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situation which might lead to a breach of the peace.

One of the Ends stated in the Preamble of the Charter of the United Nations is

> to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest,

With the end in view, it was provided in Chapter VII of the United Nations Charter that

Article 43.

1. All members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

D. **The agreement signed in London August 8, 1945, providing for the creation of the International Military Tribunal and the charter of the Tribunal** (59 Stat. 1544).

During World War II and immediately following the cessation of hostilities, the United States joined in the creation of an International Military Tribunal for the prosecution and punishment of major war criminals of the European Axis. President Truman, acting under the authority vested in the President and as Commander in Chief of the Army and Navy, by Executive Order 9547 dated May 2, 1945, designated the Honorable Robert H. Jackson, Associate Justice of the Supreme Court, as the Representative of the United States and as Chief Counsel to prepare and prosecute charges of atrocities and war crimes against such of the leaders of the European Axis Powers and their accessories as the United States might bring to trial by agreement with any of the United Nations before an international military tribunal.

Justice Jackson, as the United States Representative, and the representatives of the Provisional Government of the French Republic, the Government of the United Kingdom and Northern Ireland, and the Government of the Union of Soviet Socialist Republics, by an agreem-

signed in London August 8, 1945 provided for the setting up of the International Military Tribunal and set forth the Charter of the Tribunal. This Agreement was published as Executive Agreement, Series 472, in 59 Stat. 1544.

The Charter provided in part as follows:

II. **Jurisdiction and general principles**

Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) War Crimes: namely, violations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other in-

humane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crimes within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Article 7. The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8. The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Nineteen other members of the United Nations subsequently adhered to the Charter. These Governments were: Greece, Denmark, Yugoslavia, The Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay and Paraguay. (The Charter and Judgment of the Nuremberg Tribunal—History and Analysis, memorandum submitted by the Secretary-General, U. N. Doc. A/CN.4.5, 3 March 1949.)

By Executive Order No. 9626 dated September 24, 1945 President Truman appointed the member and an alternate member of the United States of the International Military Tribunal.

E. Control Council Law No. 10

On December 20, 1945, the four occupying powers of Germany, acting through the four Zone Commanders, promulgated Control Council Law No. 10 in order

> . . . to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal . . . (Official Gazette of the Control Council for Germany, Number 3, 31 January 1946, Berlin: Allied Secretariat, pp. 50-55).

Law No. 10 was adapted from the London Charter with certain differences, one of which was that the definition of "crimes against peace," in other respects the same as the Nuremberg Charter, included "invasions" as well as "wars" (thus furnishing a basis for charging the Austrian and Czechoslovakian conquests as crimes against peace).

Article II, Sec. 2 of Law No. 10, provided for individual responsibility for the crimes defined in Section 1 as follows:

> 2. Any person, without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he
>
> a) was a principal or
>
> b) was an accessory to the commission of any such crime or ordered or abetted the same or
>
> c) took a consenting part therein or
>
> d) was connected with plans or enterprises involving its commission or
>
> e) was a member of any organization or group connected with the commission of any such crime or

f) with reference to paragraph 1a), if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.

F. Charter of the International Military Tribunal for the Far East, January 19, 1946.

The Charter was approved by the Supreme Commander for the Allied Powers January 19, 1946; it was amended by order of the Supreme Commander, General Headquarters, APO 500, April 26, 1946. (Treaties and Other International Act Series 1589; Dept. of State Publication 2613; A Decade of American Foreign Policy, 1941-1949, Senate Document 123, 81st Cong., 1st Session, p. 961.)

The Charter provides in pertinent part:

II. Jurisdiction and general provisions

Article 5. Jurisdiction Over Persons and Offenses.

The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) **Crimes Against Peace**: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) **Conventional War Crimes**: Namely, violations of the laws or customs of war;

(c) **Crimes Against Humanity**: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, . . . whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

Article 6. Responsibility of Accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

G. **Affirmation of the principles of international law recognized by the Charter and Judgment of the Nuremberg Tribunal.**

On motion of the United States the first session of the General Assembly of the United Nations unanimously adopted a resolution affirming the principles of international law recognized by the Charter and Judgment of the Nuremberg Tribunal. [Res. 95 (I), adopted 11 December, 1946; The United States and the United Nations: Report by the President to the Congress for the year 1946, Dept. of State Pub. 2735, pp. 129-130; A Decade of American Foreign Policy, 1941-49, p. 965.]

H. **The Cairo Conference, November 22-26, 1943.**

Following the Cairo Conference on December 1, 1943, President Roosevelt, Prime Minister Churchill and Gen-

eralissimo Chiang Kai-shek issued a statement in relevant part as follows:

> The Three Great Allies are fighting this war to restrain and punish the aggression of Japan. They covet no gain for themselves and have no thought of territorial expansion. It is their purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa and the Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed. The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent (Toward Peace—Documents, Dept. of State publication 2298, p. 14; Department of State Bulletin, Dec. 4, 1943; A Decade of American Foreign Policy, 1941-1949, p. 22).

1. The Crimean (Yalta) Conference, February 4-11, 1945.

The Crimea Conference of the Heads of the Governments of the United States of America, the United Kingdom, and the Union of Soviet Socialist Republics which took place from February 4th to 11th, 1945, came to conclusions in relevant part as follows:

> By this declaration we reaffirm our faith in the principles of the Atlantic Charter, our pledge in the Declaration of the United Nations, and our determination to build in cooperation with other peace-loving nations world order under law, dedicated to peace, security, freedom and general well-being of mankind. . . .

III. **Dismemberment of Germany.**

It was agreed that Article 12 (a) of the Surrender Terms for Germany should be amended to read as follows:

> The United Kingdom, the United States of America and the Union of Soviet Socialist Republics shall possess supreme authority with respect to Germany. In the exercise of such authority they will take such steps, including the complete disarmament, demilitarization and dismemberment of Germany as they deem requisite for future peace and security. (Report of Conference, Dept. of State Bulletin of February 18, 1945, p. 214; A Decade of American Foreign Policy, 1941-1949, p. 27.)

J. **The Berlin (Potsdam) Conference, July 17-August 2, 1945.**

The tripartite conference of the three heads of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, which took place from July 17 to August 2, 1945, came to conclusions announced in relevant part as follows:

> 3. The purposes of the occupation of Germany by which the Control Council shall be guided are:
>
> > (i) The complete disarmament and demilitarization of Germany and the elimination or control of all German industry that could be used for military production.
>
> . . .
>
> B. ECONOMIC PRINCIPLES.
>
> 11. In order to eliminate Germany's war potential, the production of arms, ammunition and implements

of war as well as all types of aircraft and sea-going ships shall be prohibited and prevented . . .

. . .

15. Allied controls shall be imposed upon the German economy, but only to the extent necessary;

(a) To carry out programs of industrial disarmament and demilitarization, . . .

. . .

(d) To control German industry and all economic and financial transactions, including exports and imports, with the aim of preventing Germany from developing a war potential and achieving the other objectives named herein.

. . .

(b) **Proclamation Defining Terms for Japanese Surrender, July 26, 1945:**

(1) We—The President of the United States, the President of the National Government of the Republic of China, and the Prime Minister of Great Britain, representing the hundreds of millions of our countrymen, have conferred and agree that Japan shall be given an opportunity to end this war.

. . .

(6) There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan to embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world.

(7) Until such a new order is established **and** until there is convincing proof that Japan's war-making power is destroyed, points in Japanese territory to be designated by the Allies shall be occupied to secure

the achievement of the basic objectives we are here setting forth. (Report on the Tripartite Conference at Berlin, Department of State Bulletin of August 5, 1945, p. 153; A Decade of American Foreign Policy, 1941-1949, p. 34.)

K. **Basic initial post-surrender policy.**

Directive to Supreme Commander for the Allied Powers for the Occupation and Control of Japan, November 1, 1945.

3. Basic Objectives of Military Occupation of Japan.

(a) The ultimate objective of the United Nations with respect to Japan is to foster conditions which will give the greatest possible assurance that Japan will not again become a menace to the peace and security of the world and will permit her eventual admission as a responsible and peaceful member of the family of nations. Certain measures considered to be essential for the achievement of this objective have been set forth in the Potsdam Declaration. These measures include, among other, the carrying out of the Cairo Declaration and the limiting of Japanese sovereignty to the four main islands and such minor islands as the Allied Powers determine; the abolition of militarism and ultra-nationalism in all their forms; the disarmament and demilitarization of Japan, with continuing control over Japan's capacity to make war; . . . (The United States Department of State Documents and State Papers April, 1948, pp. 32-45; A Decade of American Foreign Policy, 1941-1949, p. 633.)

Statutes.

Tit. 22, U. S. C., Sec. 261, is as follows:

Sec. 261. Policy as to settlement of disputes and disarmament

It is declared to be the policy of the United States to adjust and settle its international disputes through mediation or arbitration, to the end that war may be honorably avoided. It looks with apprehension and disfavor upon a general increase of armament throughout the world, but it realizes that no single nation can disarm, and that without a common agreement upon the subject every considerable power must maintain a relative standing in military strength. Aug. 29, 1916, c. 417, 39 Stat. 618.

The United Nations Participation Act of 1945, as amended, carried into Tit. 22, U. S. C. A., beginning with Section 287 provides in pertinent part as follows:

Sec. 287d. Use of Armed Forces; limitations

The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of the Congress by appropriate Act or joint resolution, providing for the numbers and types of armed forces, their degree of readiness and general location, and the nature of facilities and assistance, including rights of passage, to be made available to the Security Council on its call for the purpose of maintaining international peace and security in accordance with article 43 of said Charter. The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under article 42 of said Charter and pursuant to such special agreement or agreements the armed

forces, facilities and assistance provided for therein: Provided, that except as authorized in section 287d-1 of this title, nothing contained in this section shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, or assistance provided for in such special agreement or agreements. Dec. 20, 1945, c. 583, Sec. 6, 59 Stat. 621; Oct. 10, 1949, c. 660, Sec. 4, 63 Stat. 735.

Sec. 287d-1. Noncombatant assistance to United Nations—Armed forces details; supplies and equipment; obligation of funds; procurement and replacement of requested items

(a) Notwithstanding the provisions of any other law, the President, upon request of the United Nations for cooperative action, and to the extent that he finds that it is consistent with the national interest to comply with such request, may authorize, in support of such activities of the United Nations as are specifically directed to the peaceful settlement of disputes and not involving the employment of armed forces contemplated by chapter VII of the United Nations Charter—

(1) the detail to the United Nations, under such terms and conditions as the President shall determine, of personnel of the armed forces of the United States to serve as observers, guards, or in any noncombatant capacity, but in no event shall more than a total of one thousand of such personnel be so detailed at any one time: **Provided,** That while so detailed, such personnel shall be considered for all purposes as acting in the line of duty, including the receipt of pay and allowances as personnel of the armed forces of the

United States, credit for longevity and retirement, and all other perquisites appertaining to such duty: **Provided further,** That upon authorization or approval by the President, such personnel may accept directly from the United Nations (a) any or all of the allowances or perquisites to which they are entitled under the first proviso hereof, and (b) extraordinary expenses and perquisites incident to such detail;

(2) the furnishing of facilities, services, or other assistance and the loan of the agreed fair share of the United States of any supplies and equipment to the United Nations by the Department of Defense, under such terms and conditions as the President shall determine;

(3) the obligation, insofar as necessary to carry out the purposes of clauses (1) and (2) of this subsection, of any funds appropriated to the Department of Defense or any department therein, the procurement of such personnel, supplies, equipment, facilities, services, or other assistance as may be available in accordance with the request of the United Nations, and the replacement of such items, when necessary, where they are furnished from stocks.

(paragraph (b) relating to reimbursement from United Nations; waiver of reimbursement, paragraph (c) providing additional appropriation authorization, and paragraph (d) relating to disclosure of information are omitted as not pertinent to questions raised by petition for certiorari) Dec. 20, 1945, c. 583, Sec. 7, as added Oct. 10, 1949, c. 660, Sec. 5, 63 Stat. 735; Aug. 10, 1949, c. 412, Sec. 12 (a), 63 Stat. 591.

Statute restricting use of army

"It shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, ex-

cept in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; and any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding $10,000 or imprisonment not exceeding two years or by both fine and imprisonment (June 18, 1948, c. 263, Sec. 15, 20 Stat. 152.) Tit. 10, U. S. C. A., Sec. 15.

Expedition against friendly nations prohibited

Whoever, with the United States, knowingly begins or sets on foot or provides for or prepares a means for or furnishes money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than $3,000 or imprisoned not more than three years, or both. June 25, 1948, c. 645, 62 Stat. 745. Sec. 960, Title 8, U. S. C. A.

Tit. 22, U. S. C. A.—Subchapter II.—Neutrality

Sec. 441. Proclamation of state of war between foreign states

(a) Whenever the President, or the Congress by concurrent resolution, shall find that there exists a state of war between foreign states, and that it is necessary to promote the security or preserve the peace of the United States, the President shall issue a proclamation naming the states involved; and he shall, from time to time, by proclamation, name other states as and when they may become involved in the war.

(b) Whenever the state of war which shall have caused the President to issue any proclamation under

the authority of this section shall have ceased to exist with respect to any state named in such proclamation, he shall revoke such proclamation with respect to such state. Nov. 4, 1939, 12:04 p. m., c. 2, Sec. 1, 54 Stat. 4

Sec. 421. Contracts by Government agencies for defense articles, services, etc., for foreign governments in interests of United States

The President may, from time to time, when he deems it in the interest of national defense, authorize the head of any department or agency of the Government, to enter into contracts for the procurement of defense articles, information, or services for the government of any country whose defense the President deems vital to the defense of the United States, to the extent such government agrees to pay the United States for such defense articles, information, or services prior to the receipt thereof and to make such payments from time to time as the President may require to protect the interests of the United States; and upon payment of the full cost, the President may dispose of such articles, information, or services to such government: **Provided**, that the total amount of the outstanding contracts under this section, less the amounts which have been paid to the United States under such contracts, shall at no time exceed $600,000,000. Oct. 28, 1941, c. 460, Title I, Sec. 102, 55 Stat. 746.

CASES HOLDING PRESIDENTIAL DECISIONS UNCONSTITUTIONAL *

Title of Case	Presidential Order Declared Invalid	Function of Order	Basis of Decision	Court
1. Little v. Bareme, 2 Cranch 170 (1804)	Written Instructions, March 12, 1799, to Navy Officer	Directing seizure of vessels trading with French ports	Conflict with statute	U.S. S. Ct.
2. Gilchrist v. Collector, 10 Fed. Cas. 355 (1808), No. 5420	Written Instructions, May 6, 1808, Issued as Circular Letter of Treasury	Directing detention of vessels seeking clearance for coastwise commerce	Conflict with statute	U.S. C. Ct., So. Car.
3. *The Orono*, 18 Fed. Cas. 830 (1812), No. 10,585	Proclamation, August 9, 1809	Reviving interdiction of commerce established by lapsed Embargo Acts	Separation of powers theory	U.S. C. Ct., Mass.
4. President's Proclamation Declared Illegal, 19 Fed. Cas. 1289 (1812), No. 11,391	Proclamation, August 9, 1809	Reviving interdiction of commerce established by lapsed Embargo Acts	Separation of powers theory	U.S. C. Ct., No. Car.
5. *The Wasp*, 29 Fed. Cas. 368 (1812), No. 17,249	Proclamation, August 9, 1809	Reviving interdiction of commerce established by lapsed Embargo Acts	Separation of powers theory	U.S. C. Ct., Mass.
6. Gelston v. Hoyt, 3 Wheat. 246 (1818)	Orders, July 6, 1810	Directing civilian officials to seize ship to prevent violation of Neutrality Act	Conflict with statute	U.S. S. Ct.
7. Lorimier v. Lewis, 39 Am.D. 461; 1 Morris (Iowa) 253 (1843)	License	Leasing rights to work lead mines in public lands	Separation of powers theory	Terr. of Iowa, S. Ct.
8. Jecker v. Montgomery, 13 How. 498 (1851)	Written Orders to Senior Naval Officer in California	Authorizing local military prize courts during Mexican War	Art. III, U.S. Constitution	U.S. S. Ct.

* This list does not include lower court decisions holding presidential orders unconstitutional but reversed upon appeal; it includes only cases in which final determinations on the issue of constitutionality of such orders have been made. Unless otherwise indicated, appeal was not taken to a higher court, including the Supreme Court of the United States. Where it is indicated that an appeal was taken, the higher court did not reach and decide upon the merits of the constitutional issue.

Glendon A. Schubert, Jr., THE PRESIDENCY IN THE COURTS, copyrighted 1957, University of Minnesota

Title of Case	Presidential Order Declared Invalid	Function of Order	Basis of Decision	Court
9. *Ex parte* Merryman, 17 Fed. Cas. 144 (1861), No. 9487	Unnumbered Executive Order, April 27, 1861	Authorizing military officers to suspend privilege of writ of habeas corpus	Art. I, s. 9 (2) U.S. Constitution	Chief Justice, U.S. S. Ct.
10. *Ex parte* Benedict, 3 Fed. Cas. 159 (1862), No. 1292	War Department General Order, August 8, 1862	Suspending privilege of writ of habeas corpus for draft evaders and persons arrested for disloyalty	Art. I, s. 9 (2) U.S. Constitution	U.S. D. Ct., No. Dist. of N.Y.
11. Jones v. Seward, 40 Barbour 563 (1863)	Proclamation, September 24, 1862	Suspending privilege of writ of habeas corpus for draft evaders and persons arrested for disloyalty	Art. I, s. 9 (2) U.S. Constitution	State of N.Y., S. Ct.
12. *In re* Kemp, 16 Wis. 382 (1863)	Proclamation, September 24, 1862	Suspending privilege of writ of habeas corpus for draft evaders and persons arrested for disloyalty	Art. I, s. 9 (2) U.S. Constitution	State of Wis., S. Ct.
13. Griffin v. Wilcox, 21 Ind. 370 (1863)	Proclamation, September 15, 1863	Suspending privilege of writ of habeas corpus for all prisoners of the armed forces	Amendments V and X, U.S. Constitution	State of Ind., S. Ct.
14. *Ex parte* Milligan, 4 Wall. 2 (1866)	Proclamation, September 15, 1863	Suspending privilege of writ of habeas corpus for all prisoners of the armed forces	Separation of powers theory and conflict with statute	U.S. S. Ct.
15. McCall v. McDowell, 15 Fed. Cas. 1235 (1867) No. 8673	Proclamation, September 24, 1862	Suspending privilege of writ of habeas corpus for draft evaders and persons arrested for disloyalty	Art. I, s. 9 (2) U.S. Constitution	U.S. D. Ct., Dist. of Calif.
16. McElrath v. United States, 102 U.S. 426 (1880)	Order of Secretary of Navy, July 10, 1873	Revoking order dismissing Marine officer and accepting his resignation	Conflict with statute	U.S. S. Ct.
17. Blake v. United States, 103 U.S. 227 (1881)	Unnumbered Executive Order, September 28, 1878	Revoking acceptance of resignation of Army officer and reappointing him	Conflict with statute	U.S. S. Ct.

Title of Case	Presidential Order Declared Invalid	Function of Order	Basis of Decision	Court
18. United States v. Lee, 106 U.S. 196 (1882)	Instructions to the War Department	Directing seizure of estate of General Robert E. Lee for non-payment of taxes	Amendment V, U.S. Constitution	U.S. S. Ct.
19. Spalding v. Chandler, 160 U.S. 394 (1896)	Executive Order, April 8, 1847	Reserving for military and other purposes lands included within treaty Indian reservation	Conflict with treaty	U.S. S. Ct.
20. Muir v. Louisville and Nashville R.R. Co., 247 F. 888 (1918)	Proclamation, December 26, 1917	Seizing all railroads in U.S. and appointing Secretary of Treasury as director general	Separation of powers theory and conflict with statute	U.S. D. Ct., W. Dist. of Ky.
21. *In re* Schuster, 182 N.Y.S. 357 (1920)	Executive Order, November 26, 1918	Permitting certain enemy aliens to apply for naturalization	Separation of powers theory and conflict with statute	State of N.Y., S. Ct. for Kings County
22. United States v. Western Union Tg. Co., 272 F. 311 (1921); aff'd 272 F. 893 (1921); 260 U.S. 754 (1922)	Orders to Secretary of Navy, and Revoking License for Cable in Foreign Commerce	Directing Secretary of Navy to prevent landing of oceanic cable on U.S. soil; offering conditional license	Separation of powers theory and conflict with statute	U.S. S. Ct. of Dist. Col., reversed by S. Ct. on consent of parties
23. U.S. Harness Co. v. Graham, 288 F. 929 (1921)	Unnumbered Executive Order, June 14, 1921	Declaring void a public contract between plaintiff and War Department	Amendment V, U.S. Constitution	U.S. D. Ct., Dist. of W. Va.
24. Hood Rubber Co. v. Davis, 151 N.E. 119 (1926)	Unnumbered Executive Orders, October 30 and November 5, 1919	Authorizing fuel administrator to control distribution and fix prices of coal	Conflict with statute	State of Mass., S. Ct.
25. Johnson v. Keating *ex rel* Tarantino, 17 F. 2d 50 (1926)	Executive Order No. 4125, January 12, 1925	Requiring visas on passports of immigrant aliens	Conflict with statute	U.S. 1 C.C.A.

Title of Case	Presidential Order Declared Invalid	Function of Order	Basis of Decision	Court
26. United States *ex rel* Swyston v. McCandless, 24 F. 2d 211 (1928); 33 F. 2d 882 (1929)	Proclamation and Executive Order, August 8, 1918	Directing that certain aliens be deported	Conflict with statute	U.S. D. Ct., E. Dist., of Pa.; 3 C.C.A.
27. United States v. Pan-American Petroleum Co., 55 F. 2d 753 (1932); 287 U.S. 612	Executive Order, May 31, 1921	Transferring statutory duties of Secretary of Navy to Secretary of Interior	Conflict with statute	U.S. 9 C.C.A., c.d. by S. Ct.
28. United States v. Campbell, 5 F. Supp. 156 (1933), and 291 U.S. 686 (1934)	Executive Order No. 6260 of August 28, 1933	Prohibiting the ownership or possession of gold bullion	Amendment V, U.S. Constitution	U.S. D. Ct., S.D. N.Y.; appeal dismissed by S.Ct.
29. United States v. Driscoll, 9 F. Supp. 454 (1935)	Executive Order No. 6260 of August 28, 1933	Prohibiting the ownership or possession of gold bullion	Amendment V, U.S. Constitution	U.S. D. Ct., Dist. of Mass.
30. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)	Executive Orders, July 11, 1933, and July 14, 1933	Prohibiting interstate transportation of oil in excess of state quotas; delegating authority to Secretary of Interior	Separation of powers theory and conflict with statute	U.S. S. Ct.
31. Zeiss v. United States, 23 C.C.P.A. (Customs) 7 (1935)	Presidential Proclamation No. 2020, December 14, 1932	Raising tariff duties on optical instruments suitable for use by the armed services	Conflict with statute	C.C.P.A.
32. Schechter v. United States, 295 U.S. 495 (1935)	Executive Order No. 6675-A, April 13, 1934	Approving N.R.A. Code for Live Poultry Industry, metropolitan New York area	Separation of powers theory and Art. I, s. 8 (3), U.S. Constitution	U.S. S. Ct.

APPENDIX B. DISTRIBUTION OF CASES IN APPENDIX A ACCORDING TO SUBJECT

Chapter	Subject	Number of Cases	
		All Courts	United States Supreme Court
2	Public Personnel	5	3
3	Public Domain	2	1
4	Foreign Relations	9	2
5	Executive Tariff	1	0
6	Military Rule	9	3
7	Fifth Column	3	2
8	Economic Regulation	9	3

APPENDIX C. DISTRIBUTION OF CASES IN APPENDIX A CHRONOLOGICALLY BY DECADES

Emergency*	Decade	Number of Cases	Emergency*	Decade	Number of Cases
	1791–1800	0	Civil War	1881–1890	2
War of 1812	1801–1810	2		1891–1900	1
War of 1812	1811–1820	4		1901–1910	0
	1821–1830	0	World War I	1911–1920	2
	1831–1840	0	World War I	1921–1930	5
	1841–1850	1	Depression	1931–1940	7
Mexican War	1851–1860	1	World War II	1941–1950	3
Civil War	1861–1870	7	Korean War	1950–1956	2
Civil War	1871–1880	1			

* "Emergency" refers to the time relevant to the events of the cases. Of these 38 cases, in only 7 were neither the law nor the facts, nor both, directly related to the existence of an emergency. These 7 non-emergency cases include: Lorimier v. Lewis, 39 Am.D. 461 (1843); Blake v. United States, 103 U.S. 227 (1881); Spalding v. Chandler, 160 U.S. 394 (1896); United States v. Western Union Tg. Co., 272 F. 311 (1921); United States v. Pan-American Petroleum Co., 55 F. 2d 753 (1932); Zeiss v. United States, 23 C.C.P.A. (Customs) 7 (1935); Valentine v. United States *ex rel* Neidecker, 299 U.S. 5 (1936).